

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7245

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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT
No. 76-7245

SCOA INDUSTRIES INC.,

Plaintiff-Appellant,

—v.—

FAMOLARE, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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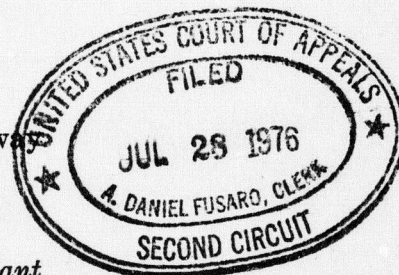


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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCOA INDUSTRIES INC., :
Plaintiff-Appellant, : Appeal No. 76-7245
v. : Appeal in 75 Civ. 3357
(S.D.N.Y.)
FAMOLARE, INC., :
Defendant-Appellee. :
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BRIEF OF PLAINTIFF-APPELLANT

ISSUES ON APPEAL

1. Whether the District Court was justified in granting a Preliminary Injunction against trademark infringement based on a single, small advertisement printed only once in a small town newspaper, which erroneously included the phrase "With Get There Sole" without authorization of plaintiff, thereby including part of defendant's trademark, and which incident is unlikely to reoccur.

2. Whether a showing of irreparable injury sufficient to warrant the grant of Preliminary Injunction can be based on such a single advertisement and the testimony of a witness employed by a competitor that a young clerk in one of plaintiff's many hundreds of stores orally referred to a shoe by the trademark (which testimony is disputed), and

where there had been no other instances of alleged trademark infringement over a period of more than a year, despite widespread advertising and promotion by both parties.

3. Whether plaintiff obtained a fair hearing before being preliminarily enjoined from the bench where the moving papers relied only on a single newspaper advertisement, but where at an evidentiary hearing a surprise witness, employed by plaintiff's competitor to seek out alleged oral infringement in a store which used no objectionable written advertising display, was produced, and the Court refused to permit plaintiff an opportunity to produce an impeaching witness from that store.

STATEMENT OF THE CASE

This is an appeal from an Order by the District Court for the Southern District of New York (Hon. Inzer B. Wyatt) entered on April 21, 1976, granting the Motion for Preliminary Injunction brought by defendant Famolare, Inc., which Order enjoins plaintiff SCOA Industries Inc., pendente lite, from using the trademark "Get There" (181a).

This litigation commenced on July 8, 1976, by the Complaint of plaintiff, SCOA Industries Inc., (hereafter "SCOA") seeking a declaratory judgment that it does not infringe the defendant Famolare's Design Patent No. 235,701, or any unspecified copyrights or trademarks of Famolare (Complaint, 5a).

SCOA had received threatening letters and telegrams charging infringement of various alleged proprietary rights of Famolare (Complaint, 5a).

Involved in the overall litigation is the question whether Famolare can exclude all competitors from the manufacture and sale in the United States of a shoe having a wavy sole. Famolare has a Design Patent No. 235,701, and a Utility Patent No. 3,936,956 (issued since the filing of the Complaint) allegedly directed to the sole; it also claimed copyright protection but Judge Wyatt ruled on February 13, 1976 (7a, 10a) that Famolare "has no claim of valid copyright as to the features of the shoe sole which SCOA has allegedly copied". Famolare also uses the stylized trademark "Get There" (17a) on its wavy sole shoes.

On February 27, 1976, Famolare obtained an Order to Show Cause why a preliminary injunction should not be entered against plaintiff SCOA for the infringement of Famolare's alleged "Get There" trademark (11a).

At an evidentiary hearing late Friday afternoon on March 26, 1976, Judge Wyatt ruled from the bench that he would grant the preliminary injunction based on findings of fact and conclusions of law to be prepared by defendant's counsel (104a). SCOA has appealed from the issuance of the preliminary injunction (191a).

STATEMENT OF FACTS

On January 22, 1976, there appeared a small advertisement for shoes in a single edition of the Visalia Times Delta (circulation 16,505) (23a) of Visalia, California (167a). The ad was placed by the local manager of one of the approximately 300 stores owned or operated by plaintiff SCOA for a wavy sole shoe and the printed ad contained the words "With Get There Sole". Within two weeks, the ad was brought to the attention of Famolare, which referred it to its attorneys. During the next month Famolare never brought the ad to the attention of anyone connected with SCOA or made any objection thereto until it requested an Order to Show Cause on February 27, 1976. The moving papers were supported merely by the February 27th affidavit of Famolare's Vice President, Carle C. Conway (125a) setting forth the extent of Famolare's sales and promotion activities and stating that, based on this single advertisement, it was his belief that Famolare will lose sales unless SCOA is enjoined. He stated that he received a copy of the Gallenkamp advertisement of January 22, 1976 during the first week of February, 1976 (126a).

SCOA responded that the single instance of the alleged trademark infringement was an unauthorized incident and, as such, cannot support a preliminary injunction.

SCOA submitted affidavits from Abe Thall, its headquarters Manager of Advertising (Thall Aff., 24a), Milt Ross, its Operations Manager for the West Coast operations of SCOA's Gallenkamp Division (Ross Aff.; 25a), Larry Anderson, Manager of SCOA's Gallenkamp store in Visalia, California (Anderson Aff.; 18a), Silverio Montoya, the Assistant Store Manager (Montoya Aff.; 21a), and Paul R. Cislini, the employee of the newspaper who handled the ad (Cislini Aff., 22a).

The four SCOA employees explained how the unauthorized wording appeared and that remedial measures have been undertaken. Thall said that he first learned of the ad on February 27, 1976, (the date of the filing of Famolare's papers herein) and, upon instructions from Lewis G. Dougherty, Senior Vice President of SCOA, contacted retail footwear division managers of SCOA with reminders and instructions that there should be no use of the "Get There" name (Thall Aff., 24a).

Mr. Ross stated that 90% of the advertising of SCOA is standardized and that his office forwards material received from SCOA Headquarters to branches under him. He included a copy of the wavy sole shoe ad that he had sent on January 8, 1976 to store managers, district and regional managers (25a, 28a, 29a) instructing them to use it "exactly as prepared" (25a) for a promotional campaign of Gallenkamp stores under his supervision, commencing January 29, 1976, and running through February 1, 1976 (26a). Except for the ad in The Visalia Times Delta, all ads placed conformed with his

instructions. A list of 134 newspapers to which SCOA directs its advertising was identified during the hearing, Plaintiff's Exhibit 1 (87a, 106a).

Larry Anderson, the Visalia store manager, stated that although it is the custom to receive the precise material for ads to be run (18a) from the district manager, he had not yet received such material and attempted to fashion an ad from other materials on hand. His store was in the midst of remodeling and "in a general state of confusion" (19a, lines 2-4). He conferred with the newspaper's Mr. Cislini, mentioned the similarity of the shoe to the Famolare "Get There" shoe, but told Cislini that the advertisement could not state that this was a "Get There" shoe. Anderson was not shown a proof of the ad prior to its being printed. (Anderson Aff., par. 8; 19a).

Silverio Montoya, in his affidavit, stated that he was present at the meeting between Anderson and Cislini and confirmed that Anderson informed Cislini that he must not use the term "Get There". (Montoya Aff., par. 2; 21a).

The Cislini affidavit of March 2, 1976, submitted by SCOA, confirms generally the meeting between Anderson and Cislini and states that Cislini took notes, but these were destroyed, that except for a printed price and border heading, no other printed matter was given to him, and the ad was run without a proof being submitted because it was smaller than a predetermined size. (Cislini Aff., 22a, 23a).

Although bringing the Motion on by an Order to Show Cause, Famolare sought an extension of time, and asked SCOA, at SCOA's expense, to bring to New York for depositions, Anderson, from Visalia, California, Ross from Los Angeles, California, and Thall from Columbus, Ohio, and to produce certain documents. SCOA offered to make each witness available in his respective locality where their documents were located. Famolare's counsel made no effort to take any of these depositions.

The hearing was set for March 26, 1976. On March 25, the Famolare attorney presented his reply memorandum in support of the application for preliminary injunction. In this memorandum and in a self-serving letter the day before, he argued that there should be an evidentiary hearing because the credibility of SCOA's store manager and other managing agents was involved. No mention was made of any other witnesses until the afternoon of March 25. Famolare submitted, with its memorandum, a new affidavit of Cislini dated March 16, 1976 which stated that he did not recall Anderson telling him not to use the name "Get There" (142a).

The reply of March 25, 1976 also included a March 16th affidavit of Richard R. Parker, owner of two "Dick Parker Shoes" stores in Visalia, California. Parker's affidavit (144a) states that he has sold Famolare "Get There" shoes in his stores since November, 1974, and that, as a result

of extensive advertising, customers frequently ask for them by the name "Get There". Parker's sales of the "Get There" shoe averages 5-10 pairs per day. No mention was made of Parker asking one of his employees to shop SCOA's Visalia Gallenkamp store (144a).

At the hearing before Judge Wyatt on March 26, Famolare called Mrs. Paula Shepherd, an employee of Parker (52a). Mrs. Shepherd testified that on February 5th or 6th, Mr. Parker instructed her to go to the (SCOA) Gallenkamp store and see if any of its ads or pictures had the words "Get There" on it and to purchase a pair of shoes similar in appearance to Famolare's (53a). On February 6th, she visited the SCOA store with a girl friend, Melinda Morris (the Morris affidavit, executed March 16, but first produced at the March 26th hearing was objected to on the ground of surprise) (54a, 124a), and testified that she saw no sign or poster or anything with the words "Get There" on it (54a).

However, she said that she asked a young sales clerk for a wavy sole shoe and, when she pointed to such a shoe in the window, that the salesman identified it as the "Get There" shoe (54a, 65a, 70a). She further testified that she purchased the pair of shoes and asked the salesman to write the name on the box, that he wrote "Get Their's" in

pencil on the box, being unable to correctly spell the name (57a, 120a). (From the number on the receipt, the salesman was identified as Dennis S. Moreno, Jr.) (58a). There is no "Get There" on the shoes or box (56a). Instead, the shoes had the trademark "Right-On" by Gallenkamp (58a). She reported to Mr. Parker about her visit on February 7, 1976. Parker told her he was going to send the box to Famolare (67a).

SCOA objected to the calling of Mrs. Shepherd on the ground that while she was asked to testify two to three weeks prior to the hearing (69a), SCOA had only been informed of the witness' name the preceding afternoon and wanted an opportunity to rebut her testimony by calling the store clerk with whom she had dealt, and who was not one of the witnesses whose deposition had been sought by Famolare's counsel (48a-50a, 77a, 97a, 99a, 100a).

Judge Wyatt stated that, while he found no palming off (81a), he relied upon Paula Shepherd's testimony in reaching a decision (99a). Judge Wyatt indicated that he would have liked to have provided SCOA an opportunity to rebut (99a), but that he felt compelled by the pressures of his calendar to refuse the opportunity (49a, 98a, 99a, 100a).

The following took place at the hearing (49a):

"MR. SOFFEN: The rebuttal can be only by someone who is in California. All these acts took place in California.

THE COURT: There is a limit as to how much time I can spend on it. Unfortunately the days have long passed when we can do this in an orderly, human, decent fashion."

Again, at a later point (99a):

"THE COURT: ... I'd like to be able to accommodate you. If I had my way and could schedule my own calendar and deal with matters as I see fit, of course I'd try to accommodate you.

MR. SOFFEN: You know --

THE COURT: But this is a place which is dedicated to the production of statistics. How many cases do you get finished with? ...

Oh, it's a thoroughly disgraceful condition, but I didn't bring it about." (100a)

Subsequent to the hearing and in opposition to plaintiff's proposed findings of fact, SCOA submitted an affidavit of Moreno (173a) which contradicted Mrs. Shepherd's version in that the salesman states that Mrs. Shepherd requested the shoes by the name "Get There" and that he replied that the store did not carry a shoe under that brand. The Court would not rehear the argument to consider this affidavit (190a), or anything further.

ARGUMENT

- I. An Isolated Instance Of Infringement As To Which No Likelihood Of Repetition Appears Cannot Be The Basis For A Finding Of Irreparable Damage Necessary For The Extraordinary Remedy Of Preliminary Injunction.

In the present case, SCOA has no interest in using the trademark "Get There". Not a single instance of its use on its shoe has occurred.* The affidavits of SCOA managerial personnel indicate that SCOA has a policy of providing advertising material prepared by its main headquarters to its various branches and sub-divisions. This procedure was followed for the shoes in issue and hundreds of such ads were run by SCOA stores on its wavy sole shoe. Through mischance, the Visalia store did not use the headquarters advertising material and prepared its own material. As soon as SCOA became aware of this single occurrence, SCOA headquarters notified all of its concerned personnel to be especially careful to guard against any use of the designation "Get There" (24a).

* In his opinion of February 13, 1976, denying Famolare's Motion for a Preliminary Injunction restraining SCOA from infringing Famolare's registered copyright, Judge Wyatt said:

"SCOA introduced shoes with thick rubber soles, having a vague similarity to 'Get There' shoes, at the National Shoe Fair held in March, 1975. Thereafter, SCOA began offering these shoes for sale. SCOA does not use any words similar to 'Get There'....". (8a).

From the affidavit of the newspaper promotion manager, Cislini, that he does not recall being told not to use the term "Get There", (90a, 91a, 142a), Judge Wyatt speculated that the newspaper employee would not have used it unless he were so instructed.

Famolare could have complained to SCOA when the incident occurred but did not do so. Instead, it made no mention of it until a month later when it requested an Order to Show Cause seeking a preliminary injunction. Thus the incident did not come to the attention of SCOA counsel and headquarters personnel until the receipt of the moving papers. Obviously, Famolare was seeking favorable publicity and to harass SCOA in this litigation instead of seeking to correct a wrong.*

No case has come to our attention in which a preliminary injunction has been granted under circumstances such as these, involving only a single isolated incident. In United Farm Workers National Union v. Sloan's Super Market, Inc., 352 F. Supp. 1025 (SDNY 1972) there were four instances of trademark

* In the case of Famolare, Inc. v. Edison Brothers Store, Inc. et al, Civil Action No. 75-C-2708, in the U.S. District Court for the Northern District of Illinois, Eastern Division, Famolare consented to an agreed order preventing it from publicizing information regarding the litigation in the Illinois Court, such litigation involving the same patents on wavy sole shoes as involved herein (112a).

infringement, but Judge Pierce denied a preliminary injunction and restated the law as follows:

"Balanced against the minimal harm suffered thus far by the plaintiff, as manifested by the four instances cited, there are the following factors to be considered with respect to the defendant's position. The defendant has acted in good faith -- bolstered by its own best business interest -- and has now taken even further steps in an attempt to stop the harm from reoccurring. Under these circumstances, where the defendant has simply inadvertently misstepped in its attempt to comply with plaintiff's request, and has acted to avoid such mistakes in the future, and there seems to be little likelihood of significant repetition during the pendency of this action, a preliminary injunction is not indicated. See Cortright v. Restor, 447 F.2d 245, 254 (2d Cir. 1971), cert. denied, 405 U.S. 965, 92 S.Ct. 1172, 31 L.Ed.2d 240 (1972); Farnum v. International Ass'n of Machinists, 161 F.Supp. 391 (S.D.N.Y.), cert. denied, 357 U.S. 916, 78 S.Ct. 1364, 2 L.Ed.2d 1363 (1958)."

The opinion in the United Farm Workers case is particularly applicable here, as this litigation has been subject to a substantial degree of publicity in the shoe trade. The granting of the extraordinary relief sought by defendant has already generated publicity adverse to plaintiff and places plaintiff under a continuing cloud. As Judge Pierce stated in the United Farm Workers case (p. 1029):

"The mere announcement to the public that Sloan's had been preliminarily enjoined in this case would convey an incorrect impression of the defendant's position with regard to the plaintiff union; would misrepresent its good faith efforts; and would likely do considerable injury to its general business reputation which is not presently justified by the record."

A request for injunction has been repeatedly denied where the alleged infringement was discontinued and there was no evidence or threat of continued infringement. In Ye Olde Tavern Cheese Products, Inc. v. Planters Peanuts Division, Standard Brands, Inc., 261 F.Supp. 200, 151 USPQ 244 (N.D. Ill. 1966), aff'd. per curiam 394 F.2d 833, 155 USPQ 481 (7th Cir. 1967) the Court stated:

"Plaintiff's first cause of action concerns defendant's use of 'Ye Olde Tavern' for a very short period in 1964. Testimony at the trial disclosed that the first sale of defendant's product under this label occurred in June 1964, that shipment to the first customer was made on or about July 5 or 6, 1964; that the Chicago office reported plaintiff's objection to the New York office on about July 9, 1964, and that the product was immediately removed from the market on about July 15 or 16, 1964, after notice was received of the filing of plaintiff's present suit. There was no evidence that defendant has since marketed or intends to market products bearing this label. An injunction is not available here. See, e.g., Champion Spark Plug Co. v. Reich, 121 F.2d 769 (8th Cir. 1941); cf. Walling v. T. Buettner & Co., 133 F.2d 306 (7th Cir.) cert. denied 319 U.S. 771, 63 S.Ct. 1437, 87 L.Ed. 1719 (1943). Plaintiff has not shown any damages or harm resulting from this specific act. Any sales which actually occurred would have been minimal. Therefore, I hold that plaintiff is not entitled to relief under its first cause of action." 261 F.Supp at 204.

To the same effect are:

Volkswagenwork A.G. v. Church, 411 F.2d 350,
161 USPQ 769 (9th Cir. 1969);

Selchow & Righter Co. v. Western Printing &
Lithographing Co., 142 F.2d 707, 61 USPQ 470 (7th
Cir.), cert. denied 323 U.S. 735 (1944).

Indeed, in Scovill Mfg. Co. v. United States Electric
Mfg. Corp., 31 F.Supp. 115, 44 USPQ 397 (S.D.N.Y. 1940), the
defendant consented to the issuance of an injunction, but the
District Court refused to grant the injunction on the ground
that defendant had discontinued its use of the mark in question
and there was no threat to resume its use.

It is clear from SCOA's affidavits that the act
complained of was an error by the publishing newspaper -- made
contrary to SCOA's instructions and policies -- and the pre-
cautions have been taken to see that it does not recur.

Where, as is true in the instant case, there is no
threat of continued infringement, an injunction is not called
for. Robert Stigwood Group Ltd. v. Hurwitz, 462 F.2d 910,
(2d Cir. 1972). Fram Corp. v. Boyd, 230 F.2d 931, 1934
(5th Cir. 1956).

This Court, in Menendez v. Saks & Co. et al, 485
F.2d 1355 (2d Cir. 1973) stated, with respect to preliminary
injunctive relief in trademark cases:

"The grant of injunctive relief depends upon whether such relief is necessary as a matter of equity to relieve against threatened further violations. General Fireproofing Company v. Wyman, 444 F.2d 391, 393 (2d Cir. 1971). '[I]t is elementary that a court of equity will not enjoin one from doing what he is not attempting and does not intend to do,' Negron v. Wallace, 436 F.2d 1139, 1145 (2d Cir. 1971) (quoting from New Standard Publishing Co. v. FTC, 194 F.2d 181, 183 (4th Cir. 1952))."

II. Findings Of Fact Prepared For The Court By
Prevailing Counsel Are Insufficient To Support
The Preliminary Injunction And Are Clearly Erroneous

Nothing in the findings adopted by the Court support a claim of irreparable damage. Moreover, the findings fail to give any indication that the complained of activity could reasonably be expected to continue, absent an injunction. Accordingly, as a matter of law, the injunction was not properly granted and should be vacated. Menendez v. Saks & Co. et al, supra; Robert Stigwood Group Ltd. v. Hurwitz, supra.

Except for deletions of some outrageously speculative language (187a), the Court adopted the findings of fact prepared by Famolare's counsel (183a-188a).

The findings, with the exception of Mrs. Shepherd's testimony, relating to the single sought-after transaction with the young shoe clerk in the Visalia, California store, are based only on the documentary record. Despite objections raised by plaintiff after the hearing, the Court adopted a number of findings which were clearly erroneous and often irrelevant to the issue.

For example, Finding 12 would conclude that the SCOA shoe sold to Mrs. Shepherd was sold as a "Get There" shoe. The record shows that the shoe was sold in a Gallenkamp shoe box with the shoe bearing a Gallenkamp trademark (120a, 121a). In fact, the Court rejected defendant's contention that Mrs. Shepherd was sold a "Get There" shoe saying:

"THE COURT: Whatever it may be, it's not palming off" (81a).

Indeed, Finding 11 (185a) conveniently omits the fact that "Get Their's" as misspelled on the shoe box was written in at the request of Parker's employee Mrs. Shepherd (54a). Moreover, the "full corroboration" found (186a) consists of nothing more than the objected to Morris affidavit (124a) executed March 16, 1976, but withheld to enhance its surprise effect at the March 26th hearing. The conclusory unsupported statement from defendant's findings that the SCOA shoe was "a close copy" (186a) is inconsistent with the Court's earlier decision that the SCOA shoe has "a vague similarity in appearance to 'Get There' shoes". (8a). Such a finding is merely an attempt to prejudice the patent issues in this case.

Finding 12 is also erroneous in asserting that the Court found that the SCOA shoe was of inferior quality. There

was no expert testimony on the point, one shoe is leather and one is vinyl (60a), and the Court simply said: "The shoes differ in quality, they differ in price..." (96a).

Finding 13 fails to indicate that the term "Get There" was used only in internal correspondence, and never before or since the incident complained of been used in connection with the sale of the SCOA shoe. The internal reference to "Get There" within the SCOA organization was long prior to the incident complained of.

The Finding 15 that the store manager "told the promotion manager of the Visalia Times Delta to use the name 'Get There' in the advertisement and did so deliberately" is wholly unsupportable and is a conclusion drawn solely from the affidavit that the promotion manager does not recall being told not to use the name "Get There". Both the Anderson and Montoya affidavits make it clear that he was told not to use this name (18a, 21a), and Cislini stated that he received no pre-printed matter, other than price and a border heading (22a).

The material stricken by the Court from proposed Finding 17 would indicate that the Court's conclusion might well have been different had plaintiff been given an opportunity to rebut the Shepherd testimony.

The findings in no way go into the issue of the harm which SCOA can suffer because of publicity resulting from injunctive relief which is totally unnecessary and improvidently granted, particularly in this case which is being followed closely by the trade press. (174a).

III. Famolare's Concealment Of Its Sole Witness On A New Issue And The Court's Refusal To Grant SCOA An Opportunity To Rebut Is A Denial Of SCOA's Opportunity To Be Heard

Famolare produced a single witness at the hearing, Paula Shepherd, who had shopped in SCOA's Visalia store for the purpose of adducing evidence of trademark infringement. No suggestion of a witness of this type is provided in the moving papers of Famolare, including its memorandum served one day before the hearing. Instead the moving papers gave the impression that Famolare's evidence would be directed only toward the single advertisement in the Visalia Times Delta.

It is submitted that Famolare's thesis that it can present one side of its case in the moving papers and deliberately conceal another side is contrary to the Rule 65(a), FRCP, which requires notice, including an opportunity to be heard.

Under the exigencies of a preliminary injunction motion, there is insufficient time for the discovery process to operate

to permit a party to ferret out the facts and contentions of the moving party. Thus, the moving party has the opportunity to take unfair advantage of a procedural situation, as occurred here, in which notice is given of some facts and contentions, and concealed as to others, resulting in the responding party's being unable to meet the concealed material on the day of the hearing and being unfairly denied such opportunity at a later date because of the pressures of the Court which it felt would not permit any further hearing time.

Moore's Federal Practice, Section 65.04(3) relating to injunctions states:

"Notice implies a hearing and all the cases are consistent with the principle that the defendant must be given a fair opportunity to oppose the application." (citing cases, including *Carter-Wallace, Inc. v. Davis-Edwards Pharmaceutical Co.*, 443 F.2d 867 (2d Cir. 1971)).

In this Circuit the rule is that where sharply disputed issues are involved, an opportunity to offer testimony is required. *Security and Exchange Commission v. Frank et al.*, 388 F.2d 486 (2 Cir. 1968); see also *Sims v. Greene*, 161 F.2d 87 (3 Cir. 1947).

In the present case, the presentation in the moving papers is misleading in that reference is made only to the newspaper advertisement and no reference is made to any store visit or the like, despite the fact that the store visit had been made and the witness had already been requested to testify. This was an inexcusable concealment and a denial of notice as required by Rule 65(a).

Subsequent to the hearing, in its Motion to present its own findings and for Rehearing, SCOA attached an affidavit of the clerk of the SCOA Visalia store, Dennis S. Moreno, Jr., which contradicted Paula Shepherd's version of the occurrence (172a). An opportunity to present this evidence should have been afforded.

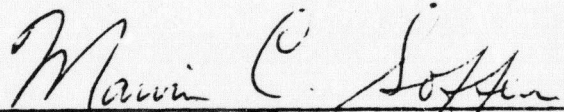
CONCLUSION

The single isolated instance of use of the "Get There" mark in the Visalia Times Delta, if attributable to SCOA, is unlikely to be repeated, since there is no evidence that SCOA has since used, or intends to use, the mark "Get There", and the equities do not justify the injunction. The hearing on the Motion for Preliminary Injunction did not comply with the "notice" requirements of Rule 65(a), FRCP.

Accordingly, the preliminary injunction entered by the Court below should be vacated.

Respectfully submitted,

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Service of ^{two} ~~three~~ (2) copies of the within
is admitted this 28 day of July. 19

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